IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 9010 of 2005
To
CRIMINAL MISC.APPLICATION No. 9015 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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KANTIBHAI G. BHOJANI & 4 - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR YOGESH S LAKHANI for Petitioners.
MR HL JANI, APP for Respondent No. 1 – State.
None for Respondent No. 2.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 16/11/2005

COMMON ORAL JUDGMENT

1.Since common issue is involved in all these six petitions and since common arguments were canvassed by the petitioners' advocate, all these six petitions are disposed of by this common judgment.

2.It is the case of the petitioners that the present respondent No. 2 – original complainant,namely, Keraken Company Limited has filed six criminal cases being Criminal Case Nos. 441 to 446 of 2004 under Section 138 of the Negotiable Instruments Act on 20.01.2004 in the Court of learned Judicial Magistrate First Class, Anand against M/s. Transglobe Food Limited., (accused No. 1), its Chairman Shri Rameshbhai A. Khakhkhar (accused No. 2), its Managing Director Shri Dilipbhai A. Khakhkhar (accused No. 3), Shri Rasbihari A. Khakhkhar, Director (accused No. 4) and Jagdish A.

Khakhkhar, Director (accused No. 5). The present petitioners are also impleaded as accused Nos. 6 to 10 in the said criminal cases being the Directors of the accused No. 1 Company. One Satish Khakhkhar is also impleaded as accused No. 11.

3.In all the aforesaid complaints, the complainant has alleged that the complainant has sent goods to the accused No. 1 Company under the bill dated 22.06.2003, 22.06.2003, 15.05.2003, 07.06.2003 and 14.06.2003. The goods sent to accused No. 1 Company were worth Rs.22,01,865/-. It is also alleged that on demand from the accused, the complainant was given nine cheques by the accused No. 1 Company, out of which the complaints were filed in respect of six cheques which were bounced. The particulars of the said six cheques are as under :-

Cheque No.	Date	Amount
991956	02/09/03	Rs. 2 Lakhs
991957	09/09/03	Rs. 2 Lakhs
991958	16.09.2003	Rs. 2 Lakhs
991959	23.09.2003	Rs. 2 Lakhs
991960	30.09.2003	Rs. 2 Lakhs
991961	07/10/03	Rs. 2 Lakhs

4.It is also alleged in the complaints that the above referred cheques were given by accused duly signed by them as Directors and it was also alleged that the complainant was assured by all the accused that on depositing the cheques in the complainant's account, the complainant would get the credit in its account. It is further alleged that the cheques have returned unpaid and, therefore, the notices were issued under the provisions of the Negotiable Instruments Act. It was further alleged in the complaint that the notice for petitioner No. 1 was returned with endorsement “refused”. The said notice was stated to have been served to petitioner Nos. 2 to 4 and 5 and

the notice had returned unserved to the petitioner No. 3.

5.It is the case of the petitioners that they were originally Directors of accused No. 1 Company. However, subsequently they have resigned as Directors. The details of their resignation as well as the Certificate issued by the accused No. 1 Company accepting their resignation are as under :-

Name	Date of Resignation	Certificate issued by Co. accepting resignation.
Kantibhai G. Bhojani	21/01/2003	01/04/03
Jayeshkumar N. Udani	01/03/03	01/03/03
Surendrasinh S. Jadeja	01/03/03	01/03/03
Rameshbhai J. Karia	03/12/02	04/12/02
Arunbhai N. Chag	03/12/02	04/12/02

6.It is also the case of the petitioners that after the petitioners have resigned as the Directors of the Company, the Company has filed

Form No. 32 with Registrar of Companies and in the said Form No. 32, the date of resignation was shown to be 01.03.2003, 01.03.2003, 01.03.2003, 03.12.2002 and 03.12.2002 respectively for the petitioner Nos. 1 to 5.

7.Mr. Yogesh S. Lakhani, learned advocate appearing for the petitioners in all these six petitions has submitted that the complainant has not specifically averred in the complaint that at the time the offence was committed, the petitioners were in-charge of and responsible for the conduct of the business of the Company. Such an averment is held to be essential and without such averment being made in a complaint, the requirements of Section 141 of Negotiable Instruments Act cannot be said to be satisfied. The petitioners being Ex-Directors in the accused No. 1 Company cannot be deemed to be in-charge of and responsible to the Company for the conduct of its business and

mere allegation of the petitioners being Directors of the Company would not be sufficient to hold them guilty and liable. He has, therefore, submitted that in none of these complaints, the complainant has at all averred as a matter of fact that the petitioners were at the relevant point of time in-charge of and responsible for the conduct of the business of the Company and, therefore, the prosecution cannot be sustained nor can it be proceeded with against the petitioners. In support of his submission, Mr. Lakhani has relied on the larger Bench decision of the Hon'ble Supreme Court in the case of *SMS Pharmaceuticals Ltd. V/s. Neeta Bhalla and another, JT 2005 (8) SC 450*.

8.Mr. Lakhani has further submitted that the petitioners were neither the Managers, Secretaries, Chairman or Managing Director of accused No. 1 Company. None of the petitioners

have signed any of the instruments in question. He has, therefore, submitted that there is no deemed liability under Section 141 of the Negotiable Instruments Act in absence of the specific averment made by the complainant about the petitioners being in-charge of and responsible for the conduct of the business of the Company as held by the Hon'ble Supreme Court in the above referred judgment. He has, therefore, submitted that the petitioners cannot be held guilty and there are no chances of petitioners being convicted at the time of trial. The prosecution against the petitioners is, therefore, required to be quashed in light of the judgment of the larger Bench of the Hon'ble Supreme Court by which the point in issue about making specific averment in the complaint is set at rest.

9.Mr. Lakhani has further submitted that even otherwise, the petitioners could not have been

held guilty of having committed the offence under the Negotiable Instruments Act for issuance of cheques by accused No. 1 Company in as much as they all have resigned much prior to the date of the transaction as well as to the date of issuance of cheques in question. It is the liability of the concerned Company from which the petitioners have resigned as Directors to file Form No. 32 and even if the same is not filed in time, the Directors resigning cannot be expected to explain the delay. The Form No. 32 clearly indicates the date of resignation. The resignation of the petitioners, therefore, take effect from the date of resignation as is notified in Form No. 32 filed by the Company. In support of his submission, Mr. Lakhani has relied on the decision of the Bombay High Court in the case of *Dushyant D. Anjaria V/s. Wall Street Finance Limited and Another, 105 Company Cases 655* and the decision of the Madras High Court in the

case of *Ashok Malhotra and Another V/s. Mansi Finance (Chennai) Limited, 110 Company Cases 604* and also the decision of Madras High Court in the case of *S.B. Shankar V/s. Amman Steel Corporation, 110 Company Cases 50*. Relying on the aforesaid judgments, Mr. Lakhani has submitted that the Bombay High Court has taken the view that even if the complaint under Section 138 of the Negotiable Instruments Act is filed, if the Form No. 32 is filed by the Company with the Registrar, the Director cannot be expected to explain the delay. It has also taken a view that Form No. 32 when clearly showing the date of resignation the same has to be accepted. The Madras High Court has also taken the view that when Form No. 32 is filed before R.O.C. in respect to the resignation of the Directors, the resignation takes effect from the date of resignation. It is further held that the Director who had resigned would be deemed to have resigned from the date of his

resignation. Mr. Lakhani has, therefore, submitted that even on this ground, no complaint can be sustained against the present petitioners.

10.Mr. Lakhani has lastly made the submission that simply because one vague statement is made in the complaint to the effect that all accused have told the complainant that when he will deposit the cheque in his bank, he will get credit of the cheques in his account, is not at all sufficient coupled with the fact that earlier statement made in the complaints that all the accused having signed the cheques as Directors, is factually incorrect. The instruments in question were never signed by all 10 accused nor was it possible to believe that all 10 accused have personally assured the complainant that when he will deposit the cheques, the same will be given credit in his account. In any case, when averments are not

made, as are found necessary and mandatory, by virtue of the judgment of the larger Bench of the Hon'ble Supreme Court, the issue whether such a bare, general and vague statement in the complaint constitute any offence or not by the petitioners pales into insignificance. The petitioners can never be said to have committed any offence nor can there be any deemed liability of the petitioners and hence, the complaints in question are required to be quashed and set aside so far as the present petitioners are concerned.

11.Mr. H.L. Jani, learned Assistant Public Prosecutor appearing for the respondent No. 1 – State in all these petitions, on the other hand, has submitted that the complaints prima facie disclose an offence against the present petitioners and their involvement is also shown in the complaints. Whether the petitioners have resigned before the cheques in question

were issued is a subject matter of trial and it cannot be decided at this stage without leading necessary evidence to this effect. He has further submitted that the scope and ambit of Section 482 is very limited and the Court is not supposed to go into the minute examination and investigation of the documents. He has, therefore, submitted that the present petitions should not be entertained by this Court while exercising its inherent jurisdiction under Section 482 of Cr.P.C.

12.After having heard Mr. Yogesh Lakhani, learned advocate appearing for the petitioners and Mr. H.L. Jani, learned Assistant Public Prosecutor appearing for the respondent No. 1 – State and after having gone through the oral as well as written submissions and the contents and averments made in the complaints as well as in the petitions and the judicial decisions relied on, the Court is of the view that it cannot be

said that there is no averment in the complaint indicating that the petitioners were in-charge and were responsible to the affairs of the Company at the time when the offence was committed. It is true that the averments are not in the same form as were found from Section 141 of the Negotiable Instruments Act. However, one has to see the substance and not the form. The Hon'ble Supreme Court has made it very clear that mere reproduction of the Section is not enough. It is specifically stated in the complaints that the accused have assured the complainant that the cheques given would be realised and the amount would be deposited in the Bank account of the complainant. It is not an issue at present to decide as to whether the averments made in the complaint are right or wrong. The Court has to accept the averments on their face value. Thus, averments clearly give an impression that unless and until the persons are in-charge of

and responsible for the affairs of the Company, they cannot assure the complainant that the complainant would get the amount when the cheques will be presented. The Court is, therefore, of the view that the larger Bench judgment of the Hon'ble Supreme Court is distinguishable on facts as the Court is of the prima facie view that the complaints do contain an averment indicating that the petitioners are in-charge of and are responsible for the affairs of the Company.

13.So far as the second issue raised by Mr. Lakhani that the petitioners have resigned much earlier before the impugned transactions were taken place and the cheques were bounced, is concerned, it is necessary to note that the petitioners have resigned between the period from December 2002 to March 2003 and the Certificates were issued by the Company accepting their resignation during the period

from December 2002 to April 2003. The goods were delivered by the complainant to the accused No. 1 Company in the month of May and June, 2003 and the cheques were issued by the accused No. 1 Company in September and October, 2003. Form No. 32 was however not filed in time. First of all, no receipt from the Registrar of Company has been produced. The only receipt which is produced at page 30 of Cri. Misc. Application No. 9010 of 2005 indicates that the said Form No. 32 was filed on 25.05.2004. The said form was in respect of the present petitioner Nos. 4 & 5. With regard to other three petitioners, no such receipt is filed. It, therefore, gives an indication that only after the cheques were bounced, notices were issued and complaints were filed, the resignations might have been given and Form No. 32 might have been filed with Registrar of Companies. On the basis of this evidence, one cannot come to the conclusion that the present

petitioners have already resigned prior to the date when the impugned transactions were taken place. It requires more evidence and it is to be proved at the time of trial that actually when the transaction was taken place, the petitioners were not the Directors of the Company. The two decisions of the Madras High Court cited in support of the petitioners are not applicable to the facts of the present case as admittedly, on the basis of the evidence which is produced along with these petitions, it is not enough to arrive at the conclusion that the petitioners have resigned much prior to the impugned transactions were taken place. In any case, these are the questions of fact which can be gone into and decided during the course of trial and the Court while exercising its inherent jurisdiction under Section 482 cannot quash the complaint merely on the basis of the documents which are not prima facie sufficient to establish that the petitioners

were not the Directors of the Company at the time when the transactions were taken place.

14. Looking to the peculiar facts and circumstances of the case and the reasons stated herein above, the Court is of the view that the issues raised before the Court require proper adjudication and leading of evidence which can be done only at the time of trial and hence, the Court is not inclined to exercise its inherent jurisdiction under Section 482 of the Criminal Procedure Code by quashing the complaints. All these petitions are therefore summarily dismissed.

[K.A. PUJ, J.]

Savariya